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No. 678.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

FLAMBEAU PLASTICS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL NO. 380, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervenor.

OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI.

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INDEX.

	Page
Standing of Union to File Opposition	2
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Proceedings Below	4
Statutes Involved	4
Statement of the Case	5
Reasons for Denying Writ	6
A. The Question of Withdrawal of Recognition	7
B. Vacation Issue	9
Conclusion	10
Appendix	
Order of the United States Court of Appeals for the Seventh Circuit, dated December 6, 1967	11
Order of the United States Court of Appeals for the Seventh Circuit, dated September 26, 1968	12
Order of the United States Court of Appeals for the Seventh Circuit, dated September 30, 1968	13

AUTHORITIES CITED.

Cases.

Franks Bros. Co. v. NLRB, 321 U. S. 702	8
NLRB v. Burnup & Sims, 379 U. S. 21	9
NLRB v. C & C Plywood Corp., 285 U. S. 421	9
NLRB v. Great Dane Trailers, Inc., 388 U. S. 26	9
NLRB v. Poultry Enterprises, Inc., 207 F. 2d 522 (5th Cir. 1953)	8
Universal Camera Corp. v. NLRB, 340 U. S. 474	7, 8, 9

Statutes.

NLRA, 61 Stat. 136, 29 USC 151, et seq.	
§ 10 (c)	4
§ 10 (e)	4

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OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI.

To the Justices of the Supreme Court of the United States:

Local No. 380, International Union Allied Industrial Workers of America, AFL-CIO[1] (hereinafter called Union) herewith submits its brief in opposition to the grant of a writ of certiorari in this matter.

[1] The Petitioner (hereinafter called Petitioner or Flambeau) incorrectly identified the Intervenor's name as "Local No. 380, *Industrial* Union . . ." The correct name of the Intervenor is Local No. 380, *International* Union Allied Industrial Workers of America, AFL-CIO.

STANDING OF UNION TO FILE OPPOSITION.

The Union was the Charging Party which initiated the proceedings before the National Labor Relations Board (hereinafter called Board). In the proceedings had before the Court of Appeals for the Seventh Circuit the Union by order of said Court was permitted to intervene as a party respondent and did, thereafter, participate fully in said proceedings. (A copy of the Court of Appeals Order is printed in the Appendix attached to this Brief at App. 1.)

OPINIONS BELOW.

The decision and order of the Board issued October 12, 1967, and is reported at 167 NLRB No. 102. (See Pet. Br. Appendix C, pp. 20-23.)

The Petitioner did not include in its brief the Trial Examiner's findings, conclusions and recommendations, however, which were adopted by the Board. The decision of the Trial Examiner is printed in full in the Joint Appendix which was submitted to the Court of Appeals and is located at pp. 8-75 of said Joint Appendix and the Union understands that this Joint Appendix has been submitted to the United States Supreme Court as part of the record and can be referred to by the parties herein.

The decision of the Court of Appeals issued August 2, 1968, and is reported at ... F. 2d ..., 68 LRRM 2981, and is set forth in full in Petitioner's Brief (Pet. Br. Appendix A, pp. 1-17).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 29, 1968 (See Pet. Br. Appendix B, pp. 18-19).

On September 26, 1968, Petitioner sought and obtained an order staying the mandate of the Court of Appeals. (A copy of the Court of Appeals orders per the Honorable Luther M. Swygert, Circuit Judge, regarding the stay of mandate is printed in the Appendix attached to this brief at App. pp. 2-3.)

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 USC, Section 1254, if it deems the questions presented warrant such review in light of the policy set forth in Rule 19 (b), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

The Union believes that the questions as presented by Petitioner (See Pet. Br., pp. 2-3) do not accurately reflect the factual findings of the Board and affirmed by the Court of Appeals and in substance Petitioner's questions are premised on facts not established in the record.

The Union would, therefore, submit that the real questions presented are:

1. Did the Court of Appeals apply the correct standard when it determined that there was substantial evidence on the record considered as a whole to support the Board's finding that the strike which started on June 15, 1966, was caused by and prolonged by Petitioner's unfair labor practices and the loss, if any, of the Union's majority status was attributable to the Petitioner's unfair labor practices?

2. Did the Court of Appeals apply the correct standard when it enforced the Board's order, which order

required Petitioner, amongst other things to continue to recognize and bargain collectively with the Union as the employees' bargaining representative notwithstanding that as a result of Petitioner's unfair labor practices the Union may have lost its majority status?

3. Did the Court of Appeals apply the correct standard when it determined that there was substantial evidence on the record considered as a whole to support the Board's finding that the terminal date for vacation eligibility was August 1, 1965, and not August 1, 1966, as argued by the Petitioner?

PROCEEDINGS BELOW.

The Union for purposes material herein accepts the Petitioner's statement of what occurred in the proceedings below (See Pet. Br. p. 3).

STATUTES INVOLVED.

The Union would only add the following pertinent portions of the National Labor Relations Act (61 Stat. 136, 29 USC 151, et seq.) to those already set forth in Petitioner's Brief (See Pet. Br. p. 4).

> "Section 10 (c) . . . The Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act . . ."
> "Section 10 (e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the [Court of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . . as provided in section 1254 of title 28. . . ."

STATEMENT OF THE CASE.

In regards to the background history, the Court of Appeals found,

> ". . . Events prior to those giving rise to the present proceeding are helpful in considering the numerous unfair labor practices found by the Board.
>
> In March 1963 the union was certified as the collective bargaining agent of the company's production, maintenance, shipping, and warehouse employees. Contract negotiations began shortly thereafter. Eleven months after the start of negotiations, the union filed unfair labor practice charges against the company. The Board, adopting the trial examiner's decision,[4] found that the company had violated sections 8 (a) (1), 8 (a) (3), and 8 (a) (5) of the Act by respectively imposing an over-broad no-solicitation rule, by both issuing a no-talking order and discriminatorily laying off a union adherent, and by not bargaining in good faith.[5] After the issuance of the Board's order on March 12, 1965, the parties resumed their bargaining, and on May 17, 1965, a one-year agreement, renewable from year to year, was executed.

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[4] The same trial examiner conducted the hearing on the charges under review in the instant proceeding.

[5] The decision and order of the Board are reported at 151 NLRB No. 610 (1965)" (See Pet. Br. Appendix A, pp. 3-4).

The labor contract was reopened and the Union and Flambeau thereafter held bargaining meetings but as found by the Trial Examiner ". . . with no significant progress being made . . ." (Joint Appendix p. 13).

On June 15, 1966, the Union called a strike, which strike was found by the Trial Examiner to have been caused by Petitioner's unfair labor practices (See Joint

Appendix p. 66). This finding of the Trial Examiner was adopted by the Board and affirmed by the Court of Appeals (See Pet. Br. Appendix A, p. 14, footnote 13).

On September 15, 1966, while the strike was in progress and while the Trial Examiner was in the process of preparing his decision having held a hearing on August 15, 1966, the Petitioner unilaterally withdrew recognition from the Union as the employees' collective bargaining representative and at all times thereafter it has refused to bargain collectively with the Union as the employees' bargaining representative.

In regards to the denial of vacation pay the Court of Appeals found,

> ". . . The Company is mistaken that the vacation eligibility date was August 1, 1966. It is clear from an analysis of both the precontract practice and the contract itself that the terminal date for vacation eligibility was August 1, 1965. Thus, those employees who had worked for the year previous to August 1, 1965, and who had also worked up to the date of the strike on June 15, 1966, were eligible for vacations with pay regardless of whether they were strikers or non-strikers . . ." (See Pet. Br. Appendix A, p. 15).

REASONS FOR DENYING WRIT.

Contrary to the Petitioner's assertion the Union respectfully submits that the instant case presents neither a new or novel question of law nor does it present any legal questions which this Court has not already passed upon.

Indeed, the Petitioner's real contention is that it disagrees with the *factual* determinations made by the Trial Examiner and adopted without dissent by the Board and affirmed by the Court of Appeals, again, without dissent.

This Court has held as to issues concerning questions of fact, ". . . Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied . . ." *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 491.

Bearing in mind the above principles the Union will take up the specific arguments of the Petitioner (See Pet. Br. pp. 7-13).

A. The Question of Withdrawal of Recognition.

The Petitioner's argument concerning its withdrawal of Union recognition on September 15, 1966 and thereafter refusing to bargain collectively with the Union as the bargaining representative of its employees really involves two questions, i. e., was such conduct a violation of the Act, if so, can the Board as part of its remedy powers order the Petitioner to continue to recognize the Union and to bargain collectively with it as the employees' bargaining representative notwithstanding that the Union may have lost its majority status owing to Petitioner's unfair labor practices?

The Petitioner would attempt to isolate the conduct of September 15, 1966, and thereby treat its withdrawal of Union recognition as if it were in a vacuum, so to speak, and not at all related to the other conduct it was found to have engaged in prior to September 15, 1966, and which conduct was found to have independently violated Section 8 (a) (5) as well as 8 (a) (1) of the Act.

The Petitioner states, ". . . The Courts of Appeals have consistently held that the *mere existence* of 8 (a) (1) violations does not *ipso facto* negate the Company's good faith doubt of the Union's majority status where there

is substantial extrinsic evidence of showing the loss of the Union's majority status . . ." (See Pet. Br. p. 8).

The Petitioner totally ignores that the Court of Appeals specifically found that even prior to September 15, 1966, the Petitioner had independently engaged in other conduct violating *Section 8 (a) (5)* of the Act ". . . by refusing to bargain with the union in good faith toward a new contract . . ." (See Pet. Br. Appendix A, p. 13).[2]

The Court of Appeals further held,

> ". . . The examiner found that the evidence showed that the company's previous unfair labor practices were responsible for whatever diminution in union membership had occurred . . . Substantial evidence of record also supports the examiner's conclusion with respect to the diminution in union membership. *NLRB v. Poultry Enterprises, Inc.*, 207 F. 2d 522 (5th Cir. 1953)" (See Pet. Br. Appendix A, p. 14, footnote 13).

Contrary to the Petitioner's assertion ". . . that a departure from existing and accepted rule has been made by the decision below." (Pet. Br. 9), the Union submits that the Court of Appeals correctly applied the law to the *facts* as found and based on the substantial evidence rule, see *Universal Camera Corp. v. NLRB, supra.*

Insofar as the Petitioner questions the propriety of the remedial order issued by the Board and affirmed by the Court of Appeals, it is clear that such order is within the Board's statutory authority, see *Franks Bros. Co. v. NLRB*, 321 U. S. 702.

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[2] The Petitioner has not appealed from this finding of the Court of Appeals.

B. Vacation Issue.

The Petitioner admits in its brief that ". . . The Board refused to give credence to the Company's interpretation of the agreement and ordered the Company to pay vacation benefits to striking employees . . ." (Pet. Br. 10). The Court of Appeals expressly affirmed the Board's interpretation and asserted,

> ". . . The company is mistaken that the vacation eligibility date was August 1, 1966. It is clear from an analysis of both the precontract practice and the contract itself that the terminal date for vacation eligibility was August 1, 1965 . . ." (See Pet. Br. Appendix A, p. 16).

The Petitioner, notwithstanding the above findings of fact, persists in its argument to this Court as if the correct date for vacation eligibility was August 1, 1966.

In substance, Petitioner again disagrees with a factual determination made by the Board and affirmed by the Court of Appeals. It is clearly not the function of this Court to reweigh the evidence at this stage of the proceeding, *Universal Camera Corp. v. NLRB, supra.*

Accepting the findings of the Board which were affirmed by the Court of Appeals, it is clear that the denial of already accrued vacation pay to the striking employees violated Sections 8 (a) (1) and (3) of the Act, *NLRB v. Great Dane Trailers, Inc.*, 388 U. S. 26.

It should also be noted that in framing its second question the Petitioner asserted ". . . and the employer's denial is based upon good faith belief it was asserting its contract rights" (See Pet. Br. 3).

In its argument Petitioner did not discuss the defense of a good faith but mistaken interpretation of its contract as a defense but instead argued that the Board and Court had both erroneously interpreted the contract.

Assuming *arguendo* that Petitioner had in good faith but mistakenly withheld the striking employees' vacation pay based on its erroneous construction of the contract, it would nonetheless under the circumstances of this case be a violation of the Act, *NLRB v. Burnup & Sims*, 379 U. S. 21; *NLRB v. C & C Plywood Corp.*, 285 U. S. 421.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the Petition for a writ of certiorari in this matter should be denied.

Respectfully submitted,

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APPEAL

APPENDIX A.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Wednesday, December 6, 1967.

Before Hon. Walter J. Cummings, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

No. 16,560.

Petition for Review of an Order From the National Labor Relations Board.

On consideration of the motion of Local Number 380, International Union Allied Industrial Workers of America, AFL-CIO,

It Is Ordered that Local Number 380, International Union Allied Industrial Workers of America, AFL-CIO be and that they are hereby granted leave to intervene in the above entitled matter.

APPENDIX B.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Thursday, September 26, 1968.

Before Hon. Luther M. Swygert, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
No. 16,560.

Petition for Review From an Order From the National Labor Relations Board.

On consideration of the motion and affidavit of counsel for petitioner,

It Is Ordered that the execution of the judgment of this Court entered on August 29, 1968 be stayed in accordance with the provisions of Rule 41 (b) of the Federal Rules of Appellate Procedure.

APPENDIX C.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Monday, September 30, 1968.

Before Hon. Luther M. Swygert, Circuit Judge.

Flambeau Plastics Corporation,
Petitioner,
vs.
National Labor Relations Board,
Respondent.
No. 16,560.

Petition for Review From an Order From the National Labor Relations Board.

Subsequent to the entry of this Court's order on September 26, 1968 in the above-entitled cause, there was filed in the office of the Clerk of this Court intervenor's opposition to petitioner's motion for stay of mandate. On consideration whereof,

It Is Hereby Ordered that the said opposition to petitioner's motion for stay of mandate be overruled with the provision that no further stay of execution of this Court's decree heretofore entered on August 29, 1968 be granted beyond the thirty (30) day stay granted by this court in its order of September 26, 1968, in accordance with the provisions of Rule 41 (b) of the Federal Rules of Civil Procedure.